IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM RIOS,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
ROBERT SANDL, et al.	:	
Defendants	:	NO. 98-454

M E M O R A N D U M

Padova, J. , 199

Plaintiff, William Rios, brought this civil rights action pro se, pursuant to 42 U.S.C.A. § 1983 (West Supp. 1998), when he was a state prisoner. He alleged that Defendants were deliberately indifferent to his serious medical needs. Plaintiff was released from prison at about the time Defendants began to file their Motions for Summary Judgment, which are considered herein. Plaintiff has not responded to the Motions, despite an extension to time allowed for him to do so; therefore, the Motions will be considered without his response. Factual support for his allegations will be drawn from Plaintiff's deposition testimony and exhibits attached to his pleadings. For reasons discussed below, the Summary Judgment Motions will be granted.

There are three separate Motions for Summary Judgment. One was filed by Defendants John McCullough and Melanie Tinsman, who are, respectively, Superintendent and Health Care Administrator at the State Correctional Institution at Houtzdale ("SCI Houtzdale"). Plaintiff was incarcerated at SCI Houtzdale

for most of his confinement. A second Motion for Summary Judgment was filed by Defendants Wexford Company, Susan Myers, and Dr. Jeffrey Pomerantz, who are, respectively, a health care provider, its administrator, and a physician, all of whom provide medical care to prisoners at SCI Houtzdale. A third Summary Judgment Motion was filed by Dr. Ralph E. Stoltz, D.O., who provided medical care to Plaintiff while he was at Keenan House, an in-patient community corrections center to which Plaintiff was paroled for a time. The Three Motions will be treated together.

I. FACTS

Plaintiff has suffered from back pains ever since he was a child. (Plaintiff's Deposition ("Dep.") at 14.) In or about 1973, when Plaintiff was incarcerated at SCI Graterford, he was taken to a hospital, and a doctor there told Plaintiff he had massive nerve damage. (Id. at 38.) Prior to the incarceration that led to this law suit, Plaintiff had had three back operations, each of which gave him only temporary relief. (Id. at 35, 30, 55.) During the third operation, pedicle screws were inserted in his spine. (Id. at 55.) Shortly after being arrested in 1995, while he was in Lehigh County Prison, Plaintiff complained of back pain. He was sent to Allentown hospital, where a physician told him that his pain was from loose pedicle screws, which were in danger of crippling him. (Id. at 71-72.) He was scheduled to see a physician with the expectation of having the screws removed, but he missed the appointment because

of his arrest on August 30, 1995. (Id. at 72; Compl. ¶ 1.) Plaintiff was sentenced to one to three years in state prison on November 1, 1995. (Compl. ¶ 1.) After interim placements at SCI Graterford and SCI Camp Hill, Plaintiff was sent to his permanent placement at SCI Houtzdale on March 26, 1996. (Dep. at 27, 74-76; McCullough's and Tinsman's Motion for Summary Judgment ("M&T Mot.") Ex. A, attach. A-1.)

At SCI Houtzdale, Plaintiff told medical personnel of his back pain and of the comments of the outside doctor about the need to remove the pedicle screws. (Dep. at 78.) Plaintiff was seen by a staff physician, Dr. Livingston, who referred him to an outside specialist, Dr. Henrik Mike-Mayer. (Id.; M&T Mot. Ex. A, attach. A-1, A-2.) Dr. Mike-Mayer, an orthopedic surgeon, saw Plaintiff several times, and recommended physical therapy. (Dep. at 81-83.) Plaintiff refused to carry out the physical therapy because it was too painful; he was therefore asked by a nurse to sign a statement that he had refused the physical therapy, which he did. (Id. at 82-85.) Plaintiff sought a back brace but Dr. Mike-Mayer said he did not believe in it. (Id. at 96.) Another prison doctor, Dr. Jeffrey Pomerantz, reported that Dr. Mike-Mayer did not believe that a back brace would not be in plaintiff's interest "due to risk of deconditioning back and abdominal muscles and lack of documented effectiveness." (M&T Mot. Ex. A, attach. A-10.) Dr. Mike-Mayer discharged Plaintiff in July of 1996 because Plaintiff was scheduled to be released to a Community Corrections Center, Keenan House. (Dep. at 98-99.)

He did not recommend an operation or any other specific course of treatment, but advised Plaintiff to see his outside physician when he was released. (Id. at 98.) Before his release, Plaintiff had medical attention between one and three times a month at SCI Houtzdale. (Id. at 93.) He also received medication regularly for his back pain and for depression. (Id. at 88.) Plaintiff was not satisfied with the relief he got from the medication for back pain, but he did not want to take other medication; he wanted surgery. (Id. at 88-89.)

Plaintiff was released to Keenan House on April 1, 1996. He was seen there by Dr. Ralph E. Stoltz, a physician who came to Keenan House once or twice a week. (Id. at 174.) Plaintiff was uncertain about the date he first saw Dr. Stoltz; it was between one week and two and one-half weeks after he arrived at Keenan House. That was the first time Dr. Stoltz was available after Plaintiff requested to see him. (Id. at 173, 175.) Plaintiff saw Dr. Stoltz on six or seven occasions within the two month period he was at Keenan House for back pain, medications and a cane. (Id. at 179, 195.)

Dr. Stoltz referred Plaintiff to another physician, who scheduled surgery to remove a painful lump on Plaintiff's back, a problem separate from the pedicle screws. (Id. at 100-02.) The day of the scheduled surgery, Keenan House personnel refused to take Plaintiff to the physician, but did not say why. (Id. at 102.) On a prior occasion, Keenan House personnel had failed to take Plaintiff for x-rays, and Dr. Stoltz and his nurse got angry

with Keenan House personnel for their failure to facilitate Plaintiff's treatment. (Id. at 103, 196.)

Dr. Stoltz told Plaintiff that he would not have an operation until he graduated from the Keenan House program, because that was Keenan House policy. (Id. at 197.) On or about June 11, 1997, Plaintiff had to leave Keenan House for failing to comply with the program there, a technical parole violation. (Id. at 104-07, 156-56; M&T Mot. Ex. A.) He was initially taken to another facility and was then returned to SCI Houtzdale on August 6, 1997. (Dep. at 107.)

Back at Houtzdale, the staff disregarded the fact that Plaintiff had previously been assigned a bottom bunk bed for medical reasons and told Plaintiff that he had to see a doctor before his bunk assignment would be changed. (Id. at 110.) After Plaintiff put in a request slip to see a doctor, a doctor's assistant went through Plaintiff's record and he was assigned a bottom bunk. (Id. at 110, 125.) Plaintiff saw Dr. Pomerantz and told him that he needed to see a neurosurgeon or orthopedic doctor. (Id. at 111.) Dr. Pomerantz did not refer Plaintiff to a neurosurgeon or orthopedist, but continued to treat him. (Id. at 111-113.) Another physician at SCI Houtzdale, Dr. Shumaker, referred Plaintiff to an outside doctor for removal of the painful lump on his back. (Id. at 115.) After the surgery, nurses at the prison continued to treat the wound, changing the dressing and applying medication twice a day for a month, despite Plaintiff's resistance. (Id. at 116-17.)

No medical personnel at SCI Houtzdale told Plaintiff directly that he needed back surgery, apart from removal of the lump; in fact, medical personnel told him that he did not need surgery. (Id. at 121, 123.) Plaintiff stated that his counselor verified with medical personnel that he needed surgery, but he did not know with whom she spoke. (Id. at 121-22.)

At some time during Plaintiff's incarceration or his parole at Keenan House, the Wexford Company took over administration of the medical department at SCI Houtzdale. (Id. at 119.) Plaintiff suspected that the Wexford Company and the Department of Corrections were "in cahoots" to save money by denying him both the back operation he wanted and referral to an outside neurologist or orthopedic surgeon. (Id. at 118-19.)

In a letter dated April 3, 1998, Dr. Mike-Mayer, responding to a request from Dr. Pomerantz regarding Plaintiff stated that he had last seen Plaintiff in 1996. (M&T Mot. Ex. A. attach. A-3.) At that time, he had discharged Plaintiff, who was to follow up with a surgeon in Philadelphia with whom Plaintiff had an appointment for further evaluation and treatment. Dr. Mike-Mayer stated, "The patient has continued to have [back] pain despite extensive non-operative and operative treatment. . . . I do not feel that any further surgery including removal of hardware and fusion of the possible pseudoarthrosis would relieve the patient's symptomatology." In a "Progress Note" dated July 10, 1998, Dr. Pomerantz stated:

> Earlier this morning I discussed Mr. Rios' case with Dr. Barolat, a surgeon at Thomas Jefferson University who assisted on one of Mr. Rios' surgeries. After reviewing Mr. Rios' course of events, physical examinations, and recommendation by Dr. Mike-Mayer, Dr. Barolat is not convinced that further surgery is necessary in this case. He concurs that there are significant risks to multiple back surgeries, and that the hardware per se probably plays minimal if any role in the patient's presentation.
>
> The case was then reviewed with Dr. Jerry Cotler, the Everett and Marian Gordon professor of orthopedics at Thomas Jefferson University and one of Mr. Rios' original surgeons. I reviewed my conversation with Dr. Barolat as well as all the above with Dr. Cotler, and he concurs with what is above.

(Id.) Dr. Cotler had not reviewed Plaintiff's x-rays.

In 1993, Plaintiff learned that he had Hepatitis C. (Dep. at 135.) Plaintiff reports that he was given a course of treatment with Interferon, and that "it did wonders," although it had some side effects. (Id. at 135, 138.) Several months before his deposition, Plaintiff experienced pain in the area of his liver. (Id. at 137.) He saw Dr. Shumaker who ordered a blood test and referred him to a specialist, Dr. Stull. (Id. at 138; M&T Mot. Ex. A, attach. A-3.) Dr. Stull wanted a biopsy to determine whether treatment with Interferon or a similar drug would be appropriate. (M&T Mot. Ex. A, attach. A-3.) The Wexford Company denied Plaintiff both the biopsy and the medication he requested. (Dep. at 138-40.) Plaintiff objected to Ms. Tinsman and Superintendent McCullough, without success. In denying Plaintiff's grievance, Ms. Tinsman relayed Dr. Pomerantz's opinion that the drug he requested had "a host of untoward side effects and many people are not able to comply with

treatment. The success record has not been very good." (M&T Mot. Ex. A, attach. A-12, A-14.) Even without the biopsy, Dr. Stull did not disagree with the decision to withhold the medication Plaintiff wanted. On April 22, 1998, he wrote to Dr. Pomerantz:

> [A]s you have noted the Wexford Health Care Services has denied this patient the retreatment with the Intron which is currently what is available in the prison system. At this point since the patient is apparently going to be released in six months and he has already failed one complete course of Intron in the past, I think his chances of responding to a repeat course of the Intron even at higher doses is probably negligible.
>
> Based on that and the fact that this patient was probably going to need to be treated if he was on monotherapy with Intron for at least 12 months, he would have to pick up in Allentown where he is from. I would recommend that when he is released he pursue an Intron dual therapy with Ribavirin or some other experimental protocol which may give him more chance at a response. So based on this, I don't disagree with the withholding of the monotreatment at this time.

(M&T Mot. Ex. A, attach. A-3.)

By the time he was released from prison, in August of 1998, Plaintiff had not had the back operation he sought to remove the pedicle screws, nor had he been given a back brace, nor had he been treated with Interferon or a similar drug.

II. LEGAL STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence with which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). A factual dispute is "material" if it might affect the outcome of the case. Id.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S. Ct. at 2554. After the moving party has met its initial burden, “the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Under

Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 255, 106 S. Ct. at 2513 ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor.").

Pro se plaintiffs are held to less stringent standards in pleadings and procedure than are plaintiffs who are represented. Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 596 (1972). However, even under this less stringent standard, Federal Rule of Civil Procedure 56 requires that a nonmoving party adduce through affidavits or otherwise "more than a scintilla of evidence" that a material fact remains in dispute. Williams v. Borough of West Chester, 891 F.2d 458, 460 (3d Cir. 1990).

III. DISCUSSION

Plaintiff has brought this action pursuant to 42 U.S.C.A. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983. Defendants have not addressed the question whether they acted under color of state law. For purposes of

this Motion, the Court will assume they did. The constitutional deprivation Plaintiff claims is Defendants' violation of his Eighth Amendment right to be free from cruel and unusual punishment.

In order for a plaintiff to show that his medical treatment during incarceration violated his Eighth Amendment rights, he must present "facts or omissions sufficiently harmful to evidence deliberate indifference to [his] serious medical needs." Estelle v. Gamble, 429 U.S. 97, 106 (1976). As the United States Court of Appeals for the Third Circuit ("Third Circuit") has stated:

> [T]his test affords considerable latitude to prison medical authorities in the diagnosis and treatment of medical problems of inmate patients. Courts will disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment. Implicit in this deference to prison medical authorities is the assumption that such informed judgment has, in fact, been made.

Inmates of Allegheny County Jail, 612 F.2d 754, 762 (3d Cir. 1979) (internal quotations and citations omitted). However, "where knowledge of the need for medical care is accompanied by the intentional refusal to provide that care, the deliberate indifference standard has been met." Monmouth County Correctional Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 (3d Cir. 1987) (internal quotations and citations omitted). Defendants do not argue that Plaintiff's medical needs were not serious. Instead, they focus on his failure to present any evidence that they acted with deliberate indifference.

The United States Supreme Court has defined "deliberate indifference" as subjective recklessness, or a conscious disregard of substantial risk of serious harm. Farmer v. Brennan, 511 U.S. 825, 839 (1994). If a defendant knows of a substantial risk to a plaintiff's health and consciously disregards it, he is being deliberately indifferent; however, a complaint that a physician "has been [merely] negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." Estelle v. Gamble, 429 U.S. at 106.

Deliberate indifference is an element of Plaintiff's claim and he bears the burden of proof on it as on all elements. To defeat Defendants' Summary Judgment Motions, Plaintiff must set forth facts showing that there was deliberate indifference and that there is therefore a genuine issue for trial on this element. Celotex, 477 U.S. at 325, 106 S. Ct. at 2554; Fed. R. Civ. P. 56(e).

Viewing the evidence in the light most favorable to Plaintiff, as the Court must under Federal Rule of Civil Procedure 56, Liberty Lobby, 477 U.S. at 255, Plaintiff has failed to sustain his burden of showing that there is a genuine issue of material fact as to whether any of the Defendants were deliberately indifferent to his serious medical needs. Insofar as specific Defendants were responsible for the failure to provide Plaintiff with surgery to remove his pedicle screws, to provide him with a back brace, to arrange for a biopsy of

Plaintiff's liver, or to treat him with Interferon or similar medication, Defendants were still providing him with medical treatment which they considered appropriate, based on informed medical judgment.

Plaintiff was frequently seen and treated by medical personnel. He was offered medication, physical therapy (which he rejected), back surgery with intensive follow-up care for a painful lump, and appointments whenever he requested medical attention. He was referred to specialists and various treatment options were considered. The specialists approved the treatment given Plaintiff in prison. Dr. Stull approved the decision to withhold the medication Plaintiff requested for his liver ailment. Dr. Mike-Mayer, Dr. Barolat, and Dr. Cotler all agreed that the prison's treatment of Plaintiff's back problem without surgery was appropriate. In addition, Dr. Pomerantz reported that Dr. Mike-Mayer considered it advisable to withhold a back brace to prevent deconditioning of Plaintiff's muscles.

Dr. Stoltz saw Plaintiff six or seven times during his two months at Keenan House. He ordered x-rays and referred Plaintiff to another physician for the painful lump on Plaintiff's back. Plaintiff provides no evidence attributing to Dr. Stoltz the staff's failure to carry out some of his orders. In fact, Plaintiff reported that Dr. Stoltz was angry over that failure.

Plaintiff did not always receive the treatment he desired and claims he needed; however, as the Third Circuit

stated, “Courts will disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment . . . [which] remains a question of sound professional judgment.” Inmates of Allegheny County Jail, 612 F.2d at 762. Based on the submissions in this case, there is no genuine issue of material fact as to one of the elements of Plaintiff's case which he must prove to prevail at trial: deliberate indifference on the part of any of the Defendants.

Defendants make other arguments in their briefs supporting their Motions for Summary Judgment: Dr. Stoltz claims the Eighth Amendment does not apply in his case because Plaintiff was not incarcerated but on parole; Defendants Tinsman and McCullough argue that they cannot be liable in a section 1983 action under the doctrines of vicarious liability or respondeat superior, and that their involvement in Plaintiff's treatment was insufficient to warrant claims of direct liability. It is not necessary to consider these arguments, however, because Plaintiff has failed to demonstrate that the medical care he received from Defendants showed deliberate indifference or even that it was negligent or otherwise inappropriate. He has merely stated that other physicians he saw recommended other treatment.

In his Amended Complaint, Plaintiff alleges that Defendants refused to give him treatment for his liver ailment in retaliation for his filing this law suit or for financial reasons or both. He has presented no evidence suggesting retaliation and did not mention it in his deposition. Drawing all inferences

from the evidence in the light most favorable to Plaintiff, it might be possible to infer that part of the reason Defendants chose certain treatment was financial; however, there is nothing illegal in such a choice where, as here, it is supported by the informed medical judgment of an outside specialist. Therefore, the claim cannot go forward.

IV. CONCLUSION

Plaintiff suffers from chronic back pain and liver disease, and he appears to be convinced that certain types of medical treatment would have helped him more than those he was given by Defendants. However, all the evidence shows that Defendants' actions were consistent with informed medical judgment, including that of the specialists to whom Plaintiff was referred. The Eighth Amendment does not require more. Summary judgment is appropriate if the non-moving party fails to make a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. at 322, 106 S. Ct. at 2552. Plaintiff has failed to make a factual showing sufficient to establish Defendants' deliberate indifference, an essential element of his claim. The Court will therefore grant all of the Defendants' Motions for Summary Judgment as to all of Plaintiff's claims.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM RIOS,	:	CIVIL ACTION
Plaintiff	:	
v.	:	
ROBERT SANDL, et al.	:	
Defendants	:	NO. 98-454

O R D E R

AND NOW, this day of , 199 , upon consideration of the Motions for Summary Judgment of Defendants John M. McCullough and Melanie Tinsman (Doc. No. 48), of Wexford Company, Susan Myers and Dr. Jeffrey Pomerantz (Doc. No. 50), and of Dr. Ralph E. Stoltz (Doc. No. 44), it is **HEREBY ORDERED** that said Motions are **GRANTED** and this case shall be marked **CLOSED.**

BY THE COURT:

_____
JOHN R. PADOVA, J.